VESTED AND CONTINGENT REMAINDERS.

The true conception of a vested remainder, and the distinction between a vested and a contingent remainder, have caused great difficulty, particularly so since it is necessary to make the distinction in applying the rule against perpetuities to future interests. It is the purpose of this article to attempt to trace the historical basis for the distinction between these two kinds of remainders, basing the discussion on Pollock & Maitland's History of English Law, Chap. 4, "Ownership and Possession."

The conception of a future interest in land was probably unknown in medieval times. All conveyances were, it may be surmised, originally for life. Now, it sometimes happened that several life estates were created at once, all the life tenants being present at the time of the conveyance and receiving livery of seisin. The donor would indicate the order in which they should enjoy the land. This postponement of the enjoyment by the continuation of another life estate was probably the beginning of the notion of the future interest.

The idea of a remainder has been largely determined by several conceptions of the early feudal law to which it is necessary to give some attention. These conceptions are (1) the notion of estates in land, (2) seisin, (3) form of conveyance.

Feudal Conception of Estates in Land.

The English feudal law seems to have conceived of estates in land as having a duration in point of time from which it necessarily followed that an estate would terminate at some time in the future, and there would be a possibility of another estate beginning then and continuing for a further period in the future.[1]

It is perhaps this peculiarity of the duration of estates in point of time which gave rise to the notion of a remainder, because, if the estate created terminated at some period in the near future,

[1] "This when regarded from the standpoint of modern jurisprudence is perhaps the most remarkable characteristic of feudalism;—several different persons in somewhat different senses may be said to have and to hold the same piece of land." 2 Pollock & Maitland, Hist. Eng. Law (1st ed.) 215. "We thus come upon a characteristic which at all events for six centuries and perhaps for many centuries more, will be the most salient trait of our English land law. Proprietary rights in land are, we may say, projected upon the plane of time. The category of quality, of duration, is applied to them." 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 10.

as, for instance, the expiration of a life in being, there would be something of the ownership in the land left which would be subject to disposition. In the case, therefore, where estates were created for life, the settler would direct what should happen to the land upon the termination of the life estates. He prescribed where the land should remain instead of coming back to him because the conception of the law was that after all his dispositions had been exhausted the land did come back. It seems, therefore, that the word "remainder" really is derived from the verb "to remain", and that the conception of a remainder is not what is left over after somebody is done with the land but where the land shall stay after the termination of the first estate given.[2]

The transaction would be something like this: Roger would convey Blackacre to William for his life, to Stephen for his life, and to Alice for her life; that is to say, he would, after making the conveyance to William, prescribe where the land should remain after William's death, and then prescribe where the land should remain after Stephen's death. Upon the death of the first life tenant, Stephen would succeed to the possession and enjoyment, and upon his death Alice would take her turn. The life estates to Stephen and Alice were remainders, that is, they were limitations of where the land should remain after the death of William.

SEISIN.

The notion of seisin underlies many parts of our land law and is of particular importance in considering the nature of a remainder. Seisin practically meant possession; that is, when a man was seized of land, he was possessed of land, although there were cases where the law gave to a situation other than that of actual possession the attribute of a sort of seisin. If it did so, it was only by way of fiction. The net result of the feudal law seems to come down to this, that there could be no conveyance of

[2] "As a matter of history it is a mistake to think that a remainder is so called because it is what remains after a 'particular estate' has been given away. The verb is far older than the noun and is applied to the land. Indeed, in our law Latin the infinitive of the verb has to do duty as a noun; a remainder is a 'remanere'. The words 'reversioner' and 'remainderman' are yet newer. In the thirteenth century one says 'he to whom the reversion or remainder belongs', or 'he who has the reversion or remainder'." 2 Pollock & Maitland Hist. Eng. Law (2nd ed.) 22, n. 2. "But occasionally in yet remote times men would endeavor to provide that one person's enjoyment of the land had come to an end, the land should not 'come back' to the donor or lessor but should 'remain', that is, stay out for some third person." 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 21.

land without livery of seisin,[3] that is, the persons acquiring an ownership in the land must be present and participate in the livery of seisin.

It was said that the seisin could not be in abeyance because seisin was practically the equivalent of possession, and the legal conceptions of the time did not admit of the transfer of any right in land except that founded on immediate possession. Possession was the ownership of land. The only ownership which could be transferred, was the possession, and as that was an existing fact, interests in land must exist with reference to it. It was not that a seisin could not be in abeyance so much as that all interests in land must follow and depend on the seisin which must always be somewhere; and could not be ignored any more than the land itself. The seisin once invested in a person stuck to him until he actually got rid of it by transfer to some one else or it was taken away from him by involuntary process or devolved on his heirs by his death.

A number of reasons have from time to time been advanced why the seisin could not be in abeyance, and as they are well known to the profession, need not be repeated here. They are all very fanciful and more or less tinged with the logic of the schoolmen.[4] While the theory undoubtedly was that the seisin could not be in abeyance, the only result so far as our discussion is concerned was that no limitation could be made involving an hiatus in the possession. As a matter of fact, the seisin or possession was frequently vacant. It would no doubt sometimes happen that the remainderman did not enter until a considerable period after the termination of the preceding estate, and that during that period there would be no one in lawful possession.

Conveyance.

It seems that a conveyance was conceived of as a present immediate delivery and was not valid unless accompanied by livery of seisin, that is to say, the possession must be transferred at the time of the conveyance and this conception of the present nature of a conveyance persisted in our law until a very late period. It was only by the operation of the principles of equity that we have been able to bring into the law the notion of the conveyance of some-

[3] 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 84.

[4] Mr. Preston says that the rule against the freehold being in abeyance was founded on the policy of the law against inconvenience for the same reason that would invalidate a limitation to a man every Monday and then to another man every Tuesday, and the like. 1 Preston, Estates, 252.

thing in the future. It therefore seems that the necessities of livery of seisin and the conception of the present nature of a conveyance imposed on the donor of lands the physical impossibility of giving land to someone in the future or to one who was not present at the time the conveyance was made.

Moreover, it appears that remainders were seldom created in the thirteenth century except by fine.[5] It is probable, therefore, that this circumstance must be taken into consideration in examining the history of remainders. A fine, in short, was a species of collusive action wherein the parties appeared in the proper court and suffered judgment to be entered according to the interests which they intended to create. Only those who were parties to the proceeding could claim under it. How, therefore, could an unascertained person or one taking an estate upon a condition precedent be party to or be bound by such a transaction? This indeed seems almost a sufficient reason in itself for the non-allowance of the validity of contingent remainders at the early common law.[6]

The fine, however, did not operate as a conveyance until possession had been taken or delivered under it. That is, the fine did not transfer the seisin, and unless the parties to the fine, or some of them, became seized in accordance therewith, it seems to have had no effect. If, therefore, none of the parties had seisin which they could surrender in accordance with the limitations of the fine, it became necessary for the seisin to be acquired in some other way. It is probable that this practice of conveyance by fine is of more importance in the present discussion than has been commonly supposed, and it is difficult at least to see how we can understand the history of remainders without taking it into account.

Early Precarious Condition of Remaindermen.

The remainderman appears to have been in a very precarious condition at the early common law.[7] It is evident from the fore-

[5] 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 94.

[6] An instance of a limitation created by fine is given in the note, 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 100, as follows: Bartholomew demandant, Maria tenant; Maria confesses the land to be the right of Bartholomew; in return he grants half of it to Maria for life, with the remainder to her son Hugh and the heirs of his body, with the remainder to her son Stephen and his heirs.

[7] The remainderman is for a while in a somewhat precarious position (13th century). This is due to two facts: (1) he is usually no party to the transaction which gave him his rights. (2) neither he nor any ancestor of his has ever been seized. Thus, if his rights are protected he must have special remedies. 2 Pollock & Maitland Hist. Eng. Law (2nd ed.) 94.

going discussion that seisin was necessary to the validity of an interest in land at common law, and that no interest could be acquired without having seisin. It also seems as if the vested remainderman was able to participate in the conveyance because the limitation was to him immediately, and he therefore could receive livery of seisin at the time of the conveyance creating the preceding particular estate. Although apparently, therefore, the validity of the remainder depended upon its participation in seisin, yet we find that even to the middle or end of the thirteenth century the remainderman had no right upon which he could recover,[8] unless he was actually seized. Many cases would no doubt occur where the remainderman would receive livery of seisin at the time of the conveyance. In the majority of cases, however, perhaps the remainderman had no actual seisin.[9] There is some difficulty, therefore, in explaining why in this state of the law it came to be said that the remainderman was seised, and that the validity of the limitation to him depended upon that seisin,—when there were many, perhaps the majority of cases, where he was not seised in point of fact. Now, although it is not possible to speak dogmatically on the subject, it may be surmised that the development of the remainderman's interest was something like this: In fact he had no seisin unless he was present at the time of the transfer. But since seisin was of such vast importance, the law was unable to conceive of any interest in land as being valid without the possessor thereof having seisin, and therefore, when the remainderman, without having actual seisin, struggled into a position of being able to claim a right in land, he could only do so by having some seisin attributed to him. By fiction, therefore, the law constructed in him a seisin which did not in point of fact exist, but in constructing that seisin in him the law was bound by the idea that he

[8] "We have seen no instance of formedon in the remainder where the remainder follows a life estate, earlier than the clear case in Y. B. 33-5 Edw. 1, p. 21 (1305). The position of any and every remainderman if he has not yet been seized is for a long time a precarious one, because the oldest actions, in particular the writ of right and the *mort d'ancester*, are competent only to one who can allege a seisin in himself or in some ancestor from whom he claims by hereditary right. Lastly, we must confess that we have but glided over the surface of a few of the many plea rolls. All our conclusions therefore are at the mercy of anyone who will read the records thoroughly." 2 Pollock & Maitland Hist. Eng. Law (2nd ed.) 28, note.

[9] "On the other hand, we cannot find that any sort or kind of seisin was as yet attributed to the remainderman. He was not seized of the land in demesne, and he was not, like the reversioner seized of it 'in service' for no service was due to him." 2 Pollock & Maitland Hist. Eng. Law (2nd ed.) 39.

could not have such seisin unless he was in such a position as to have been able to have received the seisin at the time of the original transfer. In other words, if the remainder limitation was of such a nature that the remainderman could, if present at the time of the original transfer, have participated in and received a portion of the seisin, the law would by way of fiction attribute to him a constructive seisin, and after having attributed that seisin to him, would then vest the rights in him founded upon such seisin and give him possession of the land. The notion, therefore, that a vested remainderman was one to whom a limitation was directly made without condition precedent became fixed firmly in the law.

DIFFICULTY IN ALLOWING VALIDITY OF CONTINGENT REMAINDERS.

The difficulty in allowing the validity of contingent remainders was in giving a limitation to an unascertained person or to a person subject to a condition precedent, the same rights which were given to a person to whom a limitation had been directly made without condition precedent. The latter, as we have seen, was able to take under the theory of a constructive seisin. There was, therefore, for a long time a difficulty in permitting the validity of contingent remainders, which did not lie in the circumstance that the remainder might take effect after the termination of the preceding estate, and therefore cause an abeyance in the seisin, because the law was clear that it never could be valid if such were the case, but in bringing that remainder within the conception of the vested remainder so that it could participate in the fiction of a constructive seisin.

Mr. Williams[10] points out that the first difficulty in allowing the validity of a contingent remainder was in giving it in seisin, not in the contingency or possibility of a gap.[11] The first step probably was the remainder with the condition subsequent. Here the idea was present of a direct limitation to an ascertained person, and the condition subsequent embraced in the form of the gift enabled the remainder to take effect under the fiction of a constructive seisin. The law was for a long while astute to construe a condition as a condition subsequent rather than a condition precedent in order that the remainder might be saved, and this idea has remained with us

[10] Williams, Real Property (22nd ed.) 364.

[11] Williams, *loc. cit.*, says that the notion that the inheritance is in abeyance during the contingency is only a schoolman's way of explaining the growth of the law in allowing the validity of a contingent remainder.

as a rule of construction long after the necessity for its application has passed away.

The case of the remainder to heirs deserves attention. Such a gift could not take effect according to the feudal law because the heirs were not ascertained, and therefore could not participate in the livery of seisin. It is probable, although no definite conclusion on this point can be reached, that the Rule in Shelley's Case played a very important part in developing the validity of future contingent interests.[12] In the case of a gift to A., and after his death, to his heirs, the invalidity of the limitation to the heirs being plain because of the rule of the feudal law,[13] it is probable that the court recognized the Rule in Shelley's Case in the attempt to give effect to the intention of the donor, and said that the first taker should have a fee which would practically give the same results as the life estate to him with the remainder to his heirs. Whether that was the origin of this much discussed rule or not, will probably be the subject of debate. It is worth considering, however, as having a bearing upon the discussion in hand.[14]

Mr. Kales, in a series of able articles,[15] has advanced a novel view of the distinction between a vested and a contingent remainder. His position is stated with so much ingenuity and with such plausibility that it is extremely difficult to point out the exact error in his reasoning. It is believed, however, that there is

[12]Williams, Real Property (22nd ed.) 362, says that the Rule in Shelley's Case was decided before contingent remainders were allowed. "Rule in Shelley's Case said to be first mentioned in Abel's Case (1324) 18 Edw. II, 577, which will be found translated in 7 M. & S. 941, note", 5 Gray, Cases on Property, 91.

[13]Williams says that the first case of a contingent remainder which was allowed was that of a limitation to A. for life with remainder to the right heirs of J. S., a living person. Williams, Real Property (22nd ed.) 362-363.

[14]The following table will perhaps make apparent the historical development and bring out the fact that several centuries were necessary for the development of the contingent remainder:

1200. Gifts to donee and his heirs (very common). 2 Pollock & Maitland, Hist. Eng. Law (2nd ed.) 16. Remainder probably valid under Rule in Shelley's Case.

1250. First remedy of remainderman.

1273. Feudal system of land law already decadent, 2 Pollock & Maitland, Hist. Eng. Law (2nd. ed.) 2.

1324. Rule in Shelley's Case mentioned.

1450. Contingent remainders first allowed.

1536. Statute of Uses, 27 Henry VIII, c. 10.

1650. Trustees to preserve contingent remainders.

[15]22 Law Q. Rev. 250, 383; 24 Law Q. Rev. 301.

such an error. Mr. Kales' position appears to be as follows:[16] "The following statement of the purely feudal distinction between vested and contingent remainders is proposed. Vested remainders are (a) those future interests after a particular estate of freehold which are sure to take effect in possession, and when they do, must so take effect by way of succession; and (b) those which while not sure ever to take effect in possession are bound by the express terms upon which they are limited to do so, if at all, by way of succession. Contingent remainders, on the other hand, include those future interests after a particular estate of freehold, which if they take effect as expressly limited may do so by way of succession or interruption according as the event upon which they are limited happens before or at the time of, or after the termination of the preceding interest, but which according to a rule of law must take effect by way of succession or fail entirely." That is, the distinction is between those remainders limited on the events which must happen before the termination of the preceding estate, and those limited on events which may happen after the termination of the preceding estate, but the remainder limited on an event which must happen, if at all, before the termination of the preceding estate, is just as contingent as the other. The only distinction is that in one case the remainder, if it is to take effect at all, must take effect by way of succession, whereas, in the other it may take effect too late, according to the feudal idea. The only difference then is in the contingency as to the gap in the feudal seizin.

Mr. Kales also says,[17] speaking of a vested remainder subject to a condition subsequent in the discussion between the doctor and student, as follows:

"S. Then is it vested because though in fact subject to a condition precedent it is not destructible by a rule of law defeating intent?

"D. It has not usually been thought so. It has been said that the interest is vested because the condition is expressed as subsequent in form.

"S. What difference does that make?

"D. If the condition is expressed as subsequent in form the remainder can be regarded as in existence. If the condition is precedent in form the remainder cannot possibly be thought of as in existence.

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[16] 22 Law Q. Rev. 391. See Gray, Rule Against Perpetuities (3rd ed. 1915) 80, n. 3.

[17] 24 Law Q. Rev. 305.

"S. But I thought our question was not whether the remainder was something or nothing, but whether it was or was not destructible by a rule of law defeating intent."

There was no such question at common law. Mr. Kales incorporates into the discussion his own idea when he constantly speaks of the remainder as destructible by a rule of law defeating intent. He seems to think that this is a very serious matter, and one of the reasons why he should endeavor to change the conception of a remainder. There are very many rules of law which defeat intent, and it would be just as sensible to say that a distinction should be drawn between a recorded and unrecorded conveyance in a jurisdiction where there are recording acts, because owing to circumstances which may arise the unrecorded conveyance may fail to take effect, and a recorded conveyance may, and that therefore in the case of the unrecorded conveyance, there is a rule of law defeating the intent of the grantor.

The case seems to be thus: the settlor at common law must make his limitations fit into the formulas of the common law. He could make use only of the conceptions which were understood and were provided for such future interests. The old formulas, however, remained and a distinction was naturally drawn between the old and the new. The formulas remain to this day, and while to our modern eyes the distinction has no foundation in reason and seems entirely illogical and unsound, yet when we carefully examine the history of the law, we shall see that the distinction has a very solid basis in the conceptions of the law which existed in the tenth and eleventh centuries.

Mr. Kales takes the view that all remainders were bound by feudal law to take effect by way of succession (quite true), and that since the law subsequently allowed the validity of the contingent remainders, if they took effect by way of succession, it must be very strange if the law did not formerly allow their validity since there is no substantial basis for a distinction between a remainder subject to a condition precedent and a remainder subject to a condition subsequent, as in the latter case the condition is precedent in fact although in form a condition subsequent. This, however, overlooks the fact that there were two contingencies in every contingent remainder: (1) the contingencies expressed in the limitation whether present or subsequent, (2) the condition that the remainder must to be valid take effect immediately at the termination of the preceding particular estate, or, as Mr. Kales

expresses it, by way of succession. The first was a contingency created by the settlor; the second a contingency arising from the principles of the feudal law over which the settlor had no control. It is perfectly correct, therefore, to say that in the case of the second contingency the intent of the settlor was defeated, but there is no reason why, if the intent was defeated, any distinction should be drawn on that ground. The contingency created by the settlor was at first invalid, and then recognized as valid if it could also survive the second contingency created by law. That second contingency as to a gap was never obliterated at common law, and was only removed by limitations under the statute of uses.

But the feudal system at first refused to recognize as valid a remainder limited on a precedent event which must happen, if at all, before the termination of the particular estate. Mr. Kales overlooks this, and it is this which incorporated into our law the principle of construction that a vested remainder must be directly limited and which has remained to this day. By failing to notice this Mr. Kales has missed one of the most important characteristics of the feudal system.

It is entirely improper to drag the case of trustees to preserve contingent remainders into the discussion because they were not established until the midde of the 17th century.[18] Therefore, when Mr. Kales says[19] that there was no feudal reason against the validity of a remainder in the case of trustees to preserve contingent remainders, he entirely fails to get the proper historical perspective.

SUMMARY.

The remainder was originally the limitation of the land which the donor made after the first life estate, and was not so much a remainder in the sense of a leftover as a remaining of the land away from the donor instead of coming back to him. Owing, however, to the circumstance that the feudal law could not conceive of the creation of an interest in land without a conveyance with livery of seisin, and perhaps partly under the influence of the custom of creating remainders by fine, it followed that the remainderman who had no actual seisin was without a remedy. It is probable that the remainder in such a case was originally wholly void. The validity of the remainder without actual seisin was finally sustained upon the fiction of a constructive seisin. There

[18] Gray, Rule Against Perpetuities (2nd ed. 1906) Sec. 192, n. 3.
[19] 24 Law Q. Rev. 311.

is nothing surprising in this when we remember the large part that fiction has played in the development of the common law. The fiction of a constructive seisin could, however, only be applied in a case where the nature of the limitation was such that the remainderman could have received livery of seisin if he had been present at the time of the conveyance. The law could not imagine a man having something which he was not actually able to take. The fiction could only assimilate the remainder to the facts which existed with respect to remainders which were seised in point of fact.

Hence, the only remainder which was valid at this stage of the development of the law (the beginning of the 14th century) was a direct limitation to an ascertained person. This remainder came to be described as a vested remainder, and has retained that characteristic until modern times, and would probably be recognized as such wherever the common law prevails to-day. No definite statement, however, is ventured on this point as it lies beyond the scope of the present inquiry.

A remainder to heirs was invalid because the heirs were unascertained and could not, therefore, participate in the livery of seisin. Such a remainder could derive no assistance from the fiction of constructive seisin. The Rule in Shelley's Case was probably evolved to save the limitation by uniting it to the previous estate of freehold, and thus more nearly effectuate the intention of the donor than would be the case if the limitation were denied any validity at all. The condition subsequent did not interfere with the application of the fiction of constructive seisin because the remainderman could, in point of fact, participate in the livery of seisin, and yet have the remainder taken away by the happening or non-happening of a subsequent event. Until the validity of remainders subject to a condition precedent was allowed, the law was astute to construe every condition a condition subsequent whenever it was possible to do so, and consequently the rule of construction was developed which has remained until this day.

Remainders subject to a condition precedent and to an unascertained person were finally (1450) brought within the fiction of a constructive seisin and allowed to take effect, if they could do so, at the termination of the preceding particular estate. The impossibility of permitting a gap in the seisin still remained; an obstacle which was only overcome by limitations under the statute of uses.

The characteristic of the vested remainder, that is, a limitation directly to an ascertained person, had, however, become firmly fixed in the law, and a sharp distinction was drawn between it and the contingent remainder, a distinction which has been maintained ever since. It is true that there is no rational distinction in this connection in modern eyes between a condition precedent and a condition subsequent. The suggestion, however, that the distinction is a mere senseless form of words and has no logical basis, entirely overlooks the history of the subject and ignores the spirit of the development of the common law. New ideas enter into the law slowly, and frequently, as in this case, only by way of friction. After the development has been completed, the traces of the development will often appear to a hasty observer as arbitrary and senseless forms. While it may be desirable to remove such relics of the common law by legislation, yet they cannot be removed from the path of the student of the law by blindly condemning them as irrational.

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